

APPEAL NO. 032624  
FILED NOVEMBER 24, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on September 17, 2003. The hearing officer determined that the average weekly wage (AWW) of the appellant (claimant) is \$231.38 for all income benefits. Claimant appealed this determination, contending that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 128.4(e) (Rule 128.4(e)) applied rather than Rule 128.4(f). Respondent (carrier) responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

We have reviewed the complained-of determination and conclude that the hearing officer did not err in applying the law. Claimant stated that he did not dispute that his AWW is \$231.38 for the purposes of paying temporary income benefits (TIBs). Claimant asserted that he should be able to adjust upward his AWW pursuant to Rule 128.4(e) because the wage statement carrier provided for a same or similar employee showed that that similar employee had worked for the employer more than 13 weeks. Carrier asserted that it did not matter how long the same or similar employee had worked and that because claimant himself had not worked for the employer more than 13 weeks, Rule 128.4(f) applied. The hearing officer determined that claimant was a part-time employee and that he did not work only part-time as a regular course of conduct. Claimant did not dispute this determination, although he contended that it was not relevant to the issue. It was also undisputed that claimant had worked for the employer less than 13 weeks at the time of injury.

Rule 128.4(d) states that, "[t]he [AWW] for a part-time employee who did not work part-time as a regular course of conduct shall be calculated by using one of the two methods in subsection (e) or (f) of this section, depending upon the length of time the person was employed." Rule 128.4(f) states:

*For an employee who worked for the employer less than 13 weeks or whose wage at the time of injury cannot be fixed or determined, the [AWW] will be calculated by using the method described in §128.3(e) of this title (relating to [AWW] Calculation for Full-Time Employees, and for [TIBs] for All Employees), based upon identification of a similar employee performing similar employment full-time. [Emphasis added.]*

Because claimant himself worked for the employer for less than 13 weeks at the time of the injury, the hearing officer properly applied Rule 128.4 and determined that claimant's AWW was \$231.38 for all income benefits. We conclude that the hearing officer's determination is supported by the record and is not so against the great weight

and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

According to information provided by carrier, the true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL R. OLIVER, PRESIDENT  
221 WEST 6TH STREET  
AUSTIN, TEXAS 78701.**

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Judy L. S. Barnes  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge